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In the Supreme Court of the United States

OCTOBER TERM, 1982

MANDALAY SHORES COOPERATIVE HOUSING ASSOCIATION, INC., PETITIONER

v.

SAMUEL R. PIERCE, JR., SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner contends that the Department of Housing and Urban Development erred in refusing to sell it an apartment complex acquired following the owner's default on a HUD-insured mortgage.

1. Petitioner Mandalay Shores Cooperative Housing Association is a nonprofit corporation formed by certain tenants of Mandalay Shores Apartments (hereinafter "the Apartments") located in Clearwater, Florida. The Apartments were constructed by private investors in 1963 to serve market rate tenants. They were not a project for which rents for lower and moderate income families were subsidized by the Department of Housing and Urban Development; rather, HUD's only assistance to the project was in the form of Federal Housing Administration insurance of the developer's mortgage loan under Section 207 of the National

Housing Act, 12 U.S.C. 1713, which facilitated the developer's ability to acquire a mortgage loan. Following successive defaults by two different mortgagors, HUD acquired the Apartments in 1977 after a foreclosure proceeding (Pet. App. 5a). In July 1979, the HUD Area Office informally recommended that the Apartments be sold, and in August petitioner offered to purchase the property. In March 1980, petitioner filed this action in the United States District Court for the Middle District of Florida, contending that HUD was required to negotiate exclusively with petitioner.

Following notice to the tenants of the Apartments, the Area Office forwarded to HUD's Property Disposition Committee a recommendation that the property be sold. The recommendation specifically considered petitioner's proposal to purchase the property, but recommended against it due to the shortage of rental housing in the area, the fact that the project was not formerly subsidized, and the fact that only a few tenants were eligible for rent assistance (Pet. App. 5a-6a). The Property Disposition Committee considered the alternatives for disposing of the Apartments, including sale to petitioner. Recognizing the need to maintain rental housing in the area, as well as the fact that the property needed rehabilitation, the Committee determined in September 1980 to sell the Apartments through a competitive bid for cash, but with restrictions that required continuation of the property as rental housing and completion of necessary repairs (*id.* at 6a).

In April 1981, the district court denied petitioner's request for a preliminary injunction to block sale of the Apartments and granted HUD's motion for summary judgment. The court held that the law does not mandate a particular method of sale for HUD-held projects, that the factors considered by HUD in making its determination to

seek competitive bids were proper, and that HUD had engaged in "full and studied consideration" of petitioner's offer and of concerns expressed by individual tenants (Pet. App. 8a-10a). The court concluded that the Secretary's choice of competitive public bidding as the method of sale for the Apartments "was by no means arbitrary or capricious" (*id.* at 9a-10a).

Petitioner appealed and sought an injunction pending appeal to prevent HUD from offering the Apartments for sale through a competitive bid process. In July 1981, the court of appeals denied petitioner's request for injunction and set the case for expedited consideration. In December 1981, it denied petitioner's second motion for an injunction or stay. In February 1982, the court affirmed, expressly adopting the district court's analysis and rejecting an equitable estoppel argument raised by petitioner (Pet. App. 1a-3a). On March 5, 1982, HUD sold the Apartments to a third party private purchaser (Pet. 8 n.1).

2. a. Petitioner argues first (Pet. 12-13) that the decisions below conflict with the opinion of the Ninth Circuit in *Russell* v. *Landrieu*, 621 F.2d 1037 (1980), a case involving sale of a low-income project for which rents previously had been subsidized by HUD. In *Russell* the court concluded that in exercising his discretion to dispose of property under the National Housing Act, the Secretary of HUD must consider alternatives that would enable him to effect the objectives of the Act (*id.* at 1041-1042).[1] That conclusion is fully consistent with the decision of the court of appeals here, since HUD plainly acted consistently with the purpose of the Act in deciding how to dispose of the Apartments. As the district court recognized, HUD considered petitioner's offer to purchase, but decided to adopt a different approach

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[1]The court in *Russell* went on to point out that there was no warranty that the objectives of the Act would be attained. 621 F.2d at 1041.

in order to ensure rehabilitation of the Apartments and maintenance of rental housing, of which there was a shortage in the area (Pet. App. 6a, 9a). This decision is consistent with the statutory purposes, as stated in 12 U.S.C. (Supp. V) 1701z-11(a), which include maintenance of the existing housing stock in a decent, safe, and sanitary condition and maintaining projects for the purpose of providing rental or cooperative housing. The courts below properly concluded that HUD's decision was neither arbitrary nor capricious (Pet. App. 2a, 10a).[2]

b. Petitioner contends next (Pet. 13-18) that the courts below used an incorrect standard of review and improperly failed to invalidate an interim regulation issued by HUD in October 1979. This claim is without merit. Both courts reviewed HUD's action pursuant to the standard established by the Administrative Procedure Act, 5 U.S.C. 706 (Pet. App. 1a-2a, 9a-10a). The "arbitrary and capricious" standard was clearly the correct one; under it the courts below properly refrained from substituting their judgment for that of the agency. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971).

The interim regulation challenged by petitioner provided that HUD could negotiate a sale of a project to a cooperative association only if the project had been subsidized in the past. See 24 C.F.R. 290.53(c)(2) (1980). However, under the interim regulation a waiver of this provision could be granted on a showing of good cause. See 24 C.F.R. 290.7

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[2]Petitioner claims (Pet. 18-22) that HUD's action was arbitrary and capricious in that it failed to take into account Section 246 of the Act, 12 U.S.C. 1715z-11. However, that section provides only the method for setting the terms of a mortgage after the Secretary, in his discretion, chooses to sell a project to a cooperative. The legislative history of Section 246 expressly states that disposition of properties to cooperatives is discretionary with the Secretary. See H.R. Rep. No. 93-1279, 93d Cong., 2d Sess. 153 (1974).

(1980).[3] As the district court recognized (Pet. App. 9a), HUD did not reject petitioner's purchase offer only on the basis of the interim regulation, but also considered whether a waiver of the regulation would be appropriate. The record shows that HUD considered the merits of petitioner's proposal, but rejected it primarily because a sale to petitioner would have removed the apartment units from the rental market in an area already suffering from a shortage of rental housing, which would have been contrary to departmental policy (*id.* at 6a-7a, 9a). Thus, the validity of the interim regulation is irrelevant since it was not the deciding factor in HUD's decision to reject petitioner's offer.[4]

c. Finally, petitioner contends (Pet. 22-24) that the court of appeals should have granted rehearing in order to apply the law in existence at the time of decision. Petitioner refers to HUD's recent action altering the authority of its Property Disposition Committee. See 47 Fed. Reg. 19471 (1982). However, at the time the Committee determined how the Apartments should be sold, it was clearly the body with delegated authority to make this decision. See Pet. App. 2a. The fact that this authority was subsequently removed is irrelevant to the question whether the Committee held the authority at the time it decided on disposition of the Apartments.

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[3]Under an earlier interim regulation HUD could have negotiated a sale of an unsubsidized project to a cooperative association without a waiver. See 24 C.F.R. 290.50 (1977).

[4]Petitioner argues also (Pet. 17) that the interim regulation was ineffective because a review by Senate and House committees required by 42 U.S.C. (Supp. II) 3535(*o*) had not been completed. However, because HUD's decision was not based primarily on the challenged regulation, but rather on concern about the shortage of rental housing and the need for rehabilitation, the constitutional validity of the legislative review provisions cited by petitioner is not at issue here, and there is no reason to hold this case pending a resolution by this Court of the constitutional question.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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